UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LISA WORCESTER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-362-P-C***
	)	
JOHN J. CALLAHAN,	***)***	
Acting Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Supplemental Security Income ("SSI") appeal raises the issues of whether there is substantial evidence in the record supporting the Commissioner's determination that the claimant suffers no severe impairment other than bilateral hearing loss, whether there is substantial evidence in the record supporting the Commissioner's determination that the plaintiff is able to perform jobs that exist in significant numbers in the national economy, and whether the hypothetical question posed to the vocational expert at the hearing on the plaintiff's application was fatally deficient. I

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[1] Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security John J. Callahan is substituted as the defendant in this matter.

[2] This action is properly brought under 42 U.S.C. § 1383(c)(3). The Commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 23, 1997 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

recommend that the court remand the case for further proceedings.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since August 30, 1994, Finding 1, Record p. 25; that she suffers from bilateral hearing loss, an impairment that does not meet or equal any of those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 2, Record p. 25; that she lacks the residual functional capacity to work "in exposure to" wetness, humidity and noise or to work with dangerous machinery, Finding 4, Record p. 25; that she is unable to perform her past relevant work, Finding 5, Record p. 26; that, based on her age, high school education and unskilled work experience, she is able to make a successful adjustment to work which exists in significant numbers in the national economy, Findings 6-9, Record p. 26; and that, therefore, she was not under a disability at any time prior to the decision on April 27, 1995, Finding 12, Record p. 26. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final determination of the Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U. S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff asserts that she has severe mental and physical impairments in addition to the

bilateral hearing loss noted by the administrative law judge. She correctly points out that her burden to establish the existence of a severe impairment at Step 2 of the sequential evaluation process is a *de minimis* one. *McDonald v. Secretary of Health & Human Servs*., 795 F.2d 1118, 1125 (1st Cir. 1986).

The plaintiff first argues that she has a severe mental impairment, based on the records of her evaluation by a psychiatrist at Jackson Brook Institute on February 9, 1995. Record at 141-43. That record contains a diagnosis of "R[ule] O[ut] Intermittent Explosive Disorder," notes as to Axis V "Current 45 - Past 50," and does not recommend any medication or treatment other than counseling with a licensed clinical social worker. *Id*. at 143. The record also includes notes of the social worker concerning sessions on December 21, 1994 and January 31, 1995. *Id*. at 144-48. The plaintiff testified at the hearing held on March 23, 1995 that she had been going to Jackson Brook once a week since January. *Id*. at 51.

The plaintiff contends that the Axis V notation by the psychiatrist indicates a Global Assessment of Functioning rating, which is described in the Diagnostic and Statistical Manual of Mental Disorders ("DSM IV") as "serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)." It is unclear which of these factors provided the basis for this assessment, since the Jackson Brook record contains no reference to severe obsessional rituals or shoplifting, includes the plaintiff's denial of suicidal ideation, *id*. at 148, and includes no statements concerning lack of friends or inability to keep a job for other than physical reasons. At any rate, the plaintiff argues that this notation, unexplained to the administrative law judge at the hearing, meets her *de minimis* burden. While this notation does not necessarily negate the judge's

finding that "the claimant's intermittent explosive disorder does not impose significant restrictions in her ability to perform basic work activities," *id*. at 22, and the plaintiff's own testimony actually supports this finding, *id*. at 44-48, I cannot say that there is substantial evidence in the record to support an inferred finding that the plaintiff has no mental impairment. Only in such a circumstance would the absence from the record of a Psychiatric Review Technique Form ("PRTF"), required by 20 C.F.R. § 416.920a(b), become harmless error.

When a mental impairment is asserted, an administrative law judge must assess its severity following the special procedure outlined in section 416.920a(b). The failure to fill out the form necessitates remand. *Montgomery v. Shalala*, 30 F.3d 98, 100 (8th Cir. 1994).

An impairment is considered severe only if it significantly limits physical or mental ability to do basic work activities. 20 C.F.R. § 416.920(c). At Step 2 of the sequential evaluation process, medical evidence alone is evaluated in order to assess any limitations caused by an impairment. Social Security Ruling 85-28, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 at 390-95. Such evidence must include an assessment supported by medical signs and findings "complete and detailed enough to allow [the Commissioner] . . . to determine . . . the nature and limiting effects of [any] impairment(s)." 20 C.F.R. § 416.913(d)(1). There is no indication in the record that the administrative law judge specifically considered the effect of the plaintiff's asserted mental impairment on her ability to perform basic work activities as required by 20 C.F.R. § 416.921(a) & (b). *See generally Sprague v. Heckler*, 595 F. Supp. 1380, 1382-83 (D. Me. 1984).

The commissioner argues that the failure of the administrative law judge or the Appeals Council to complete a PRTF in this case is harmless error because the evidence establishes that the plaintiff's mental impairment is not severe. Even if I had not determined that such a conclusion is

not supported by substantial evidence in the record, a remand due to this failure would still be required. The only authority cited by the commissioner in support of his position on this point is unpublished. As counsel for the commissioner should be aware, the First Circuit's Local Rule 36.2(b)(6) states that unpublished opinions may be cited only in related cases. This rule is applicable to litigation in this court. *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith v. Bishop*, 839 F. Supp. 68, 73 n.3 (D. Me. 1993). Moreover, the First Circuit has made clear that most of its opinions in Social Security benefits cases will "clearly" be inappropriate for publication. 1st Cir. Loc. R. 36.2(a). Finally, the footnote in the unpublished First Circuit opinion to which the commissioner refers makes it clear that an abbreviated PRTF was part of the record in that case. Without relying on that case, I draw comfort from the fact that it is not at variance with my recommendation. *See United Transp. Union v. Springfield Terminal Co.*, 869 F. Supp. 42, 48 n.6 (D. Me. 1994) (court may "draw[] comfort" from unpublished opinions).

My own research has revealed only one reported case supporting the commissioner's position, *Baker v. Chater*, 957 F. Supp. 75, 80 (D. Md. 1996). I do not find *Baker* to be persuasive. At least three circuits have found that the absence of a PRTF requires remand. *Montgomery*, 30 F.3d at 100; *Stambaugh v. Sullivan*, 929 F.2d 292, 296 (7th Cir. 1991); *Hill v. Sullivan*, 924 F.2d 972, 975 (10th Cir. 1991). On this point, and for this case, I find the majority position to be better reasoned.

While remand is necessary for this reason alone, one further point may assist the commissioner in further proceedings. The plaintiff also asserts that her chronic back pain also constitutes a severe impairment. She notes her reports of such pain in the medical records on four occasions in 1994 and 1995. Record at 169-185. However, the only medical evidence addressing

the plaintiff's ability to perform basic work activities in the context of this reported pain is the report of Paul Stucki, M.D., a physician who examined her as a consultant for the state agency. Contrary to the plaintiff's argument, the fact that Dr. Stucki recorded her reported limits on standing and lifting, "with no indication that [he] disputed them," Itemized Statement of Errors (Docket No. 3) at 5, is not the equivalent of undisputed medical evidence that such limits have a medical basis.

The record includes a chiropractor's report of an x-ray of the lumbar spine, in 1992, as revealing a hypolordotic spine.[3] *Id*. at 156. While Dr. Stucki reports no specific limits on work activities due to the reported back pain, his conclusions are less than specific in this regard. *Id*. at 118. Because the plaintiff's burden at Step 2 is *de minimis*, the administrative law judge should have found the plaintiff's lower back pain to be a severe impairment.

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 30th day of June, 1997.

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[3] Information from a chiropractor is entitled to less weight than that from a licensed physician. 20 C.F.R. § 416.913.

David M. Cohen
United States Magistrate Judge